SUPREME COURT, U. S.
SEP 21 1967
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 135

PAUL R. JONES,

Petitioner,

v.

UNITED STATES OF AMERICA.

REPLY BRIEF FOR PETITIONER JONES

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Though the new rules of this Court effective October 2, 1967 are not technically applicable to this Reply Brief, in the spirit of Rule 24(4) we address this Brief to arguments first raised in the Brief for the United States in Opposition.

1. The Government argues that petitioner Jones' conviction was amply supported by the evidence, because "Jones' statement in his affidavit that he left New York on a three-week trip 'just before the Government rested its case' was therefore false" (G. Br. 20-21).[1] But we have not here denied that Jones did meet with Mittelman on May 4, 1960, after the prosecution rested its case the first time. Jones' statement was thus inaccurate—but since the only evidence as to his belief (except Mittelman's grand jury testimony) was that he believed that the May 4

[1] Such references are to the pages in the Brief for the United States in Opposition.

meeting occurred while the Government was still presenting its case, being here at Government expense (see Jones' Petition, pp. 6, 29), his affidavit was not wilfully false. Nor did any of the many other participants in the May 4 meeting testify that Jones knew that the Government had rested prior thereto.

The Government twice contends that the plain purpose of Jones' statement "was to give * * * corroboration to Mittelman's false claim" (G. Br. 7, 21)—but the Government does not tell us how Jones could have corroborated Mittelman's false claim, since Mittelman's false claim was made six weeks after the execution of Jones' affidavit. Nor was there any evidence to show that Jones had any knowledge of the claim that Mittelman would make.

The Government attempts to circumvent this void by arguing that, from the context of the Jones affidavit, he intended to refer to the Government's resting in chief, that otherwise the critical paragraphs of his affidavit would have been "pointless" (G. Br. 21, n. 11).[2] However, this attributes to Jones, a layman, a knowledge of the "point" of his affidavit, which would only have been understood by a lawyer—a point which the Government here feels it must recite to this Court and support by citation (G. Br. 24). In any event, there was nothing to show that Jones knew the point of his affidavit. *Per contra*, the evidence showed he did not.

He was merely asked by Mittelman's attorney to give a certain affidavit. He told that attorney that Mittelman could have called him as a witness—but he was told by the attorney that the purpose of his (Jones') affidavit was merely to show that when he left New York he could not

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[2] The Government recites that "the alleged ambiguity in the indictment [as to which resting the Jones affidavit referred to] is raised for the first time in this Court." G. Br. p. 21, n. 11. Not so, the point was squarely raised in the Supplemental Petition for Rehearing below (Tr. 209a-210a).

have been called as a witness. Said Jones (2 R. 40-41):

> "Q. Did you read the affidavit before you signed it? A. Yes, sir.
>
> Q. And did you suggest to Mr. Rogge [Mittelman's attorney] at that time that, perhaps, you should put in the fact that this trip to Texas occurred after your last trip to New York, not after the time that the Government told you it was not going to use [you] as a witness? A. I don't remember saying it in that many words, but I do remember that I mentioned the fact, after this was prepared, that the defense could have called me as a witness if they wanted to but that they decided not to, and I don't remember the exact reply that I got, but this was—the purpose of this affidavit was to show that when I did leave that nobody could have gotten me back as a witness and that Holland and Carroll had perjured themselves on the witness stand.
>
> Q. Did you discuss with Mr. Rogge the fact that this affidavit was misleading and that it created the impression that you had left before the government had rested the case, and at that time was unavailable to the defense? A. No, I don't remember discussing that or going into that with Mr. Rogge. As I said a moment ago, I do remember our discussing the fact that they could have used me but that they didn't."

Although Mr. Rogge was present throughout the trial as counsel for Mittelman, the Government did not call him to the stand to demonstrate any untruthfulness in the above-quoted Jones' grand jury testimony.

Simply stated, there was simply no admissible evidence of Jones' guilt. He cannot be jailed for eighteen months in the absence of any admissible evidence whatsoever that he committed a crime without violation of due process. *Thompson* v. *Louisville*, 362 U. S. 199 (1960). Moreover, the proof in no regard whatsoever rises to the dignity of proof required by the perjury two-witness rule.

2. The Government contends that this Court decided, in *United States* v. *Hvass*, 355 U. S. 570, that the Federal Rules of Criminal Procedure are laws of the United States within the meaning of the perjury statute (G. Br. p. 11). However, *Hvass* did not involve the Federal Rules of Criminal Procedure, but involved an oath taken pursuant to a local court rule authorized by the Federal Rules of Civil Procedure. The Federal Rules of Criminal Procedure, on the other hand, were never intended to become law. This is manifest from the legislative history of Public Law 772 of the Eightieth Congress, which became Title 18 of the United States Code.

Thus, Charles J. Zinn, Esq., Counsel to the House Committee, which considered the 1948 revision of the Criminal Code (Title 18), said:

> "* * * There are a number of substantive matters relating to criminal procedure which are not properly the subject of court rules and these have not been incorporated in the proposed rules by the Supreme Court. * * * The reason for [the cross-referencing of the United States Code to the Rules] is that, although it is desirable to have the statutes and the rules in one place, inasmuch as Congress has restored to the Court its rule-making power, *there should be no suggestion by the incorporation of the text of the rules that Congress intends to enact the rules into law.* When the code is enacted into law the text of the rules will undoubtedly be carried as notes to the respective sections of title 18 of the United States Code referring to them and the convenience of the bench and bar will be thus best served." (Emphasis supplied) (92 Cong. Rec. A-60, A-62, reprinted in U.S.C.A., Title 18, last volume, pp. 675-676)

Mr. Zinn also testified at a hearing before the House Committee on Revision of the Laws, saying as follows:

"* * * The rules will in all likelihood be reported to Congress by the Attorney General at the opening of the next session and by the provisions of the authorizing act will become effective at the close of that session without any affirmative action being taken on the part of Congress. It is not a legislative job.

"On the other hand, the revision and codification of the criminal statutes contemplated by H.R. 5450 is purely and strictly a legislative one.

"These are two different and distinct works—the rules and the laws—and it is important to bear the distinction in mind." (18 U.S.C.A., last volume, p. 593.)

Later in his testimony, Mr. Zinn pointed out the distinction between the laws and the Rules of Criminal Procedure:

"* * * I ask you to consider the implications of that authorization [to promulgate rules of criminal procedure] and its effect upon laws relating to criminal procedure unless Congress takes action to conform the laws to the rules and specifically repeals obsolete laws." (*Id.* at 596.)

That Public Law 772, now known as Title 18 of the United States Code, is intended to embody in itself all the substantive law, and that the Rules of Criminal Procedure are not laws of the United States, is further shown by the remarks of Senator Wiley in a Senate floor discussion, where he said in part:

"The bill makes it easy to find the criminal statutes because of the arrangement, numbering, and classification. * * * The new Federal Rules of Criminal Procedure are keyed to the bill and are reflected in part II of title 18.

"Obsolete and executed provisions are eliminated. Uncertainty will be ended and there will no longer be any need to examine the many volumes of the Stat-

utes at Large as the bill, upon enactment, will itself embody the substantive law which will thus appear in full in the United States Code." (*Id.* at 671, 94 Cong. Rec. 8906.)

It is thus clear that whether the Federal Rules of Criminal Procedure are laws of the United States is a substantial question worthy of review here.

3. The Government argues (G. Br. 12-13) that there is no merit to our contention that the indictment misjoined Jones and Mittleman as defendants, since Rule 8(b) authorizes joinder of defendants in the same indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Though the Government specifically quotes the word "alleged", it ignores the fact that such an allegation was completely missing from the indictment. The indictment was a misjoinder.

4. The Government argues that the instruction was challenged in the Trial Court only because the indictment did not allege any agreement or joint undertaking. Not so. It was further challenged because this was not a conspiracy prosecution (Tr. 905). However, nothing in Rule 30 precludes our asserting here a different argument in support of a contention that the challenged evidence should have been excluded at the trial. Moreover, the plain error in the instructions and the resulting error in admitting Mittelman's affidavit and grand jury testimony against Jones would warrant reversal even if there had been a failure to object. *Lopez* v. *United States*, 373 U. S. 427, 436 (1963). But in any event, there was objection raised in both courts below as to the admissibility of Mittelman's affidavit and grand jury testimony.[3]

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[3] *E.g.*, the Brief of appellant Paul Jones in the Court of Appeals at page 18:

"The * * * inadmissibility of the Mittelman exhibits as against Jones, leaves the Government's case deficient as a matter of law."

5. The Government states twice (G. Br. 9, 20) that Jones had consulted with an attorney (Mittleman's) on the afternoon preceding his appearance. We had stated, however, that he had not consulted an attorney in regard to his appearance (J. Pet. 6). The Government's citations and ours to the Record are precisely the same. The accuracy of our statement is correct, as shown in the margin below.[4]

6. The Government contends that when the case was called, Jones, through his attorney, expressly declined to move to dismiss on the ground of delay of trial (G. Br. 22). Though the Government is accurate, we note that in pre-*Klopfer* days, such a motion would have been pointless. Accordingly, Jones was not precluded from raising the *Klopfer* point in the Court of Appeals for the first time. *Curtis Publishing Co.* v. *Butts,* 388 U. S. 372 (1967). He raised the point below within two weeks of this Court's decision in *Klopfer* v. *North Carolina,* 386 U. S. 213 (1967).[5]

There is another important factor relevant to grant of review: the deterrent effect of this conviction upon appli-

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[4] "Q. Have you consulted with an attorney with respect to your appearance here today? A. Not concerning my appearance here. Not a personal attorney, no.

Q. But you spoke to an attorney? A. Yes." (2 R. 30)

[5] The Government suggests that the reason for the delay in trial was Mittelman's incarceration in the interval (G. Br., p. 22). But this did not prevent an earlier trial. So noted Chief Judge Sugarman:

"The Court: Why wasn't it prosecuted sooner?

Mr. Baer [Asst. U. S. Atty.]: Because the defendant Mittelman was in jail.

The Court: Why couldn't you bring him down here on a writ?

Mr. Baer: Well, that is something his lawyers can tell you about.

The Court: No, you could have done it.

Mr. Baer: Well, your Honor—

The Court: We do it every day." (Tr. 738).

cation for a new trial. New trials based on newly discovered evidence are almost impossible to secure in a federal court; there are many roadblocks, most of which are archaic, which developed arbitrarily, without rationale. [The writer has written extensively on this in his article, Levy, "Justice—After Trial", 11 New York Law Forum 241, 369 (1965)]. Now that the entire might of the United States Government can descend upon a witness who signs a somewhat ambiguous affidavit in support of a motion for a new trial, prepared by an attorney not of his own choice, without any motive to lie, it is almost unthinkable that any person hereafter would be able, willing or wise to give an affidavit in support of a motion for a new criminal trial. It is altogether too easy to make mistakes. And since the decision below permits the convict to turn against the witness later, while shielding himself from cross-examination, the decision below may seriously interfere with the rights of convicts to apply for a new trial. The ambiguity should be corrected by a hearing—not by a conviction for perjury. Cf. *Surowitz* v. *Hilton Hotels Corp.*, 383 U. S. 363 (1966).

CONCLUSION

This Court should grant certiorari, the judgment below should be reversed, and the indictment dismissed.

Respectfully submitted,

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